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E-filed on October 13, 2010

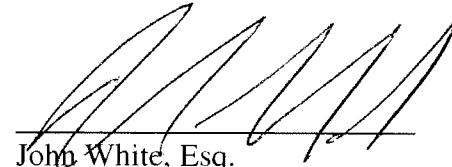
8 UNITED STATES BANKRUPTCY COURT
9 DISTRICT OF NEVADA

10 In re:) CASE NO: BK-N-05-54727-gwz
11 SCOTT K. GREENE,)
12) Chapter 7
13) DEBTOR'S REPLY TO TRUSTEE'S
14) OBJECTION TO DEBTOR'S
15) AMENDMENTS TO SCHEDULES;
16)
17 Debtor) COUNTER-MOTION FOR ORDER
18) COMPELLING TRUSTEE TO TURN
19) OVER DEBTOR'S HOMESTEAD
20)
21) Date of Hearing: November 10, 2010
22) Time of Hearing: 10:00 A.M.
23)
24)

25 Debtor, by his counsel, White Law Chartered, hereby replies to the Trustee's Objection
26 to Debtor's Amendments to Schedules, filed herein on September 22, 2010 and moves this Court
27 for an order compelling Trustee to turn over Debtor's Homestead.

28 In support of this Reply and Motion, Debtor relies upon the below Points and Authorities,
the Declaration of David Rankine, filed herewith, and the files and records in this Case.

DATED: October 13, 2010



John White, Esq.

1
2
3 POINTS AND AUTHORITIES

4 FACTS:

5 The facts are uncontested. The Voluntary Petition in this Case was filed on October 15,
6 2005. Schedule C was attached to the Debtor's petition and provided as follows:

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8 In re: Scott Kevin Greene

9
10 SCHEDULE C PROPERTY CLAIMED AS EXEMPT

11 Debtor(s) elect(s) the exemption to which the debtor(s) is entitled under:

12 11 U.S.C. §522(d)(1) Federal exemptions provided in 11 U.S.C. §522(d). Note: these exemptions are available *only in*
13 11 U.S.C. §522(d)(2) Exemptions available under applicable nonbankruptcy federal laws, state or local laws where the
14 debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion
of the 180 day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent
the interest is exempt from process under applicable nonbankruptcy law. Specifically, debtor selects the exemptions of the
state of Nevada.

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemptions
2000 1 ton Dodge pickup	NRS § 21.090(1)(f)	\$15,000.00	\$15,000.00
Clothes	NRS § 21.090(1)(b)	\$400.00	\$400.00
Personal items and effects, furniture, 450 Alamosa Dr. and Vista Park Storage	NRS § 21.090(1)(b)	\$2,000.00	\$2,000.00
Debtor's residence Alamosa Dr. (all 67 acres)	NRS § 21.090(1)(m)	\$240,000.00	\$240,000.00
Remington 12 Gage	NRS § 21.090(1)(i)	\$200.00	\$200.00
Medical Library, computers, veterinary supplies, dental instruments, office supplies, generator, freezer etc.	NRS § 21.090(1)(d)	\$10,000.00	\$10,000.00
Personal Library, Record Collection	NRS § 21.090(1)(a)	\$750.00	\$750.00
Totally In Tune (quarterhorse gelding)	NRS §21.090(1)(c) & (d)	\$1000.00	\$1000.00

26 On July 27, 2006, this Court determined that Debtor's homestead exemption was limited
27 to \$125,000. See *In re Greene*, 346 B.R. 835. On November 29, 2006, this Court authorized the

1 sale of Debtor's homestead. Both orders were appealed, the appeals were consolidated (Docket
 2 134). The District Court affirmed on May 27, 2007 (Docket 156). On October 2, 2009, the Ninth
 3 Circuit determined that Debtor's homestead was not limited to \$125,000 (*In re Greene*, 583 F.3d
 4 614).

5 The Ninth Circuit, as pertains to the present issue, being the post-petition appreciation
 6 issue, noted:

7 If Greene's claim is that his 2005 petition incorrectly declared the value of the Property,
 8 the proper course of action would be for him to amend his petition pursuant to FED. R.
 9 BANKR. P. 1009(a), in which "[a] voluntary petition, list, schedule, or statement may be
 10 amended by the debtor as a matter of course at any time before the 626*626 case is
 11 closed." We note that a court may disallow the amendment only upon "a showing of bad
 12 faith or prejudice to third parties," *Arnold v. Gill* (*In re Arnold*), 252 B.R. 778, 784 (9th
 13 Cir.BAP2000) (quoting *Magallanes v. Williams* (*In re Magallanes*), 96 B.R. 253, 256 (9th
 14 Cir. BAP1988)), but take no position as to whether bad faith or prejudice exists in this
 15 case.

16 *In re Greene*, 583 F. 3d 614, 625 (CA 9, 2009).

17 Neither the recent *Schwab v Reilly*, 130 S Ct, 2652 (2010) nor the even more recent *In re*
 18 *Matter of Gebhart* (07-16769, 07-35704) (9th Cir, Sept 14, 2010) caste any doubt on the
 19 aforequoted language in *In re Greene*.

20 Following the Ninth Circuit's decision, Debtor had the property appraised by John E.
 21 Raphael, a licensed Nevada real estate appraiser, who determined, on April 16, 2010, that the fair
 22 market value of Debtor's homestead in October, 2005 was \$370,000.

23 On April 16, 2010, Debtor amended his Schedule C to read as follows:

24 (The rest of this page is intentionally blank)

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In re Scott Kevin Greene

AMENDED
SCHEDULE C — PROPERTY CLAIMED AS EXEMPT

Debtor(s) elect(s) the exemption to which the debtor(s) is entitled under:

11 U.S.C. §522(d)(1) Federal exemptions provided in 11 U.S.C. §522(d). Note: these exemptions are available only if the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180 day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law. Specifically, debtor selects the exemptions of the state of Nevada.

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemptions
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Personal Library, Record Collection	NRS § 21.090(1)(a)	\$750.00	\$750.00
Totally In Tone (quarterhouse gelding)	NRS §21.090(1)(c) & (d)	\$1000.00	\$1000.00

Amended Schedule A, filed at the same time, also stated the value of Debtor's residence at \$370,000 on the Petition date. Debtor attached Mr. Raphel's appraisal to his Amended Schedules (part of Docket 208). The Trustee has not presented any evidence that this appraisal mis-states the value of Debtor's homestead on October 15, 2005.

On September 22, 2010, the Trustee filed an objection to Debtor's Amended Schedules.

ISSUES:

Therefore, the only issues before this Court at this time are whether the Trustee has

1 shown that Debtor's Amendment to Schedule C was in bad faith or in prejudice to the rights of
 2 third parties and whether the Trustee's Objection was timely filed.
 3

4 **ARGUMENT:**

5 The general rule is that, at least in the absence of bad faith or prejudice, a debtor may
 6 amend lists or schedules without court permission at any time during the pendency of the case.
 7 *In re Magallanes*, 96 BR 253 - (9th Cir. BAP, 1988).

8 **1. NO BAD FAITH** has been shown.

9 The original declared value of Debtor's homestead (\$240,000) was sufficient to guarantee
 10 Debtor his full homestead as determined by this Court and, on appeal, by the District Court.
 11 Amending his schedule C prior to the October 2nd, 2009 decision of the Ninth Circuit would
 12 have been largely a useless act. Debtor would have been out-of-pocket for the cost of an
 13 appraisal, yet would not have been entitled to an additional penny. As the law does not require
 14 anyone to do a futile act, *Ohio v. Roberts*, 448 US 56, 74 (1980), it follows that a Debtor's
 15 failure to do a useless act cannot be bad faith. This may explain the Trustee's failure to rest her
 16 objection on bad faith grounds.

17 In any event, there is no bad faith. There is no hiding of assets, the "usual" ground for a
 18 finding of bad faith. *In re Arnold*, 252 BR 778, 785 (BAP-9th Circuit 2000). Claiming an
 19 exemption late, by itself, is not bad faith. *Arnold, supra*, p 786.

20 **2. NO PREJUDICE**

21 **No prejudice to creditors.**

22 The Trustee does not content that any creditor has been prejudiced by the 2010
 23 amendments, i.e. that a creditor would have done something differently had it known the true
 24 market value of Debtor's homestead. As the *Arnold* court notes, with approval, the view that
 25 simple delay alone does not prejudice creditors is "widely held." p. 787.

26 **No prejudice to Trustee or her counsel.**

27 Excepting the obvious fact that post-petition appreciation issues would not have been
 28

1 litigated, the Trustee wholly fails to show that she would have acted differently had the true
 2 fair market value of the Debtor's homestead been known to her. *Arnold, supra*, p 787. And,
 3 as is clear from a reading of the various Greene decisions, the post-petition appreciation issue
 4 was not the significant issue on appeal. The significant issue on appeal was whether the
 5 Debtor's exemption was subject to the \$125,000 limitation in 11 USC §522(p). Only about
 6 10% of the Ninth Circuit's *Greene* opinion is devoted to the post-petition appreciation issue.
 7

8 Here, Debtor has not amended his claim of exemption. That has always been \$240,000.
 9 Debtor here simply seeks to amend to establish the accurate value of the property against which
 10 his \$240,000 exemption is claimed. In contrast, the issue in *Arnold* did not concern the value of
 11 an asset originally claimed as exempt (*Arnold* had not scheduled the exempt State Court action
 12 as an asset of the estate, much less an exempt asset), but rather whether the Debtor could amend
 13 to exempt an asset previously not claimed as exempt.

14 The Trustee's reliance on the Arnold discussion of prejudice to the Trustee (*Arnold*,
 15 *supra*, p 788 - 789) is misplaced. Though *Arnold* did allow administrative expenses to be paid
 16 from exempt assets, there the Trustee and her counsel by their effort obtained the \$200,000 in
 17 exempt assets for the estate. *Arnold* allowed them to be paid from that fund. Here, the Trustee
 18 and her counsel brought nothing into the estate. Their action in the appellate litigation brought
 19 not a dime of benefit to either the estate or the creditors.

20 Nor has the Trustee made any showing of detrimental reliance, to wit, unlike the case in
 21 *Arnold*, the evidence here is that the trustee would have done nothing different (excepting argue
 22 the post-petition appreciate issue) had the Debtor accurately stated the market value of his home
 23 in his original schedules. Further, the September 29, 2010 Declaration of David Rankine, filed
 24 herewith, shows that the Trustee, prior to any fee awards in this case, assured Mr. Rankine, then
 25 Debtor's co-counsel on the appeals, that he would not seek his fees or expenses from "money
 26 that might have to be given to Mr. Greene." (Par. 3). The Rankine Declaration estops the
 27 Trustee from now deducting administrative expenses from Debtor's homestead.

1
2 Still further, the homestead is inviolate, as the Ninth Circuit notes in *In re Greene*, at
3 footnote 4 (page 626):

4 [A] bankruptcy court applying Florida law explained: Homestead is simply a status,
5 constitutionally defined, which exempts certain property from execution . . . It is not a property
6 interest. When a Florida resident's property acquires homestead status, the owner does not
7 acquire any of the rights traditionally associated with property interests: the right to possession,
8 the right to use, the right to transfer — the owner already holds whatever of those he has.
Accordingly, homestead status in Florida is not properly conceptualized as a stick in the bundle;
rather, it is a protective safe in which the bundle is put. *Venn v. Reinhard (In re Reinhard)*, 377
B.R. 315, 319-20 (Bankr. N.D.Fla. 2007)

9 **3. THE TRUSTEE'S OBJECTION IS UNTIMELY** (F.R.Bankr.P. 4003(b)(1))

10 Though there is significant correspondence between the parties and their counsel, and
11 though Debtor did agree in July of this year that the Trustee could "T" up this dispute by filing
12 an objection to Debtor's 2010 amendments, the files of Debtor's counsel show no stipulation to
13 extend the Trustee's time to object to the 2010 amendments.

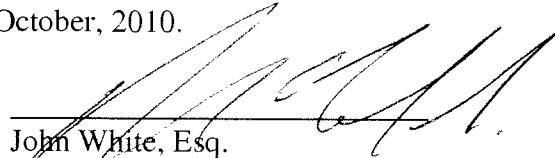
14 F.R.Bankr.P 4002(b)(1) requires that an interested party object to an amendment within
15 30 days. As Justice Thomas notes in *Schwab v Reilly*, 130 S Ct, 2652 (2010):

16 If an interested party does not object to the claimed interest by the time the rule 4003
17 period expires, title to the asset will remain with the estate pursuant to section 541, and
18 the debtor will be guaranteed a payment in the dollar amount of the exemption.
Schwab, supra, p 2667 (emphasis added).

20 The Debtor's 2010 amendment to Schedule C was filed and served on April 16, 2010.
21 The Trustee's objection to Debtor's amended Schedules was filed September 22, 2010, more than
22 30 days after the Debtor's Amendments were filed.

23 WHEREFORE, Debtor requests an order allowing his 2010 Amendments and directing
24 the Trustee to turn over to him \$115,000, being the remainder of his \$240,000 claimed
homestead.

25
26 Respectfully submitted this 13th day of October, 2010.

27
28 
John White, Esq.